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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 115

JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION at the Port of San Francisco, petitioner

v.

LOI HOA

No. 116

JOHN D. NAGLE, AS COMMISSIONER OF IMMIGRATION at the Port of San Francisco, petitioner

v.

LAM YOUNG, FOR AND ON BEHALF OF PHUONG CON

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The United States District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 21, Loi Hoa; R. 23, Phuong Con) is reported in 13 F. (2d) 80.

JURISDICTION

The judgments of the Circuit Court of Appeals to be reviewed were entered June 1, 1926. (R. 23, Loi Hoa; R. 25, Phuong Con.) The petition for certiorari was filed August 31, 1926, and granted November 23, 1926, pursuant to the Act of February 13, 1925.

QUESTION PRESENTED

Section 6 of the Chinese Exclusion Act of May 6, 1882, as amended by the Act of July 5, 1884, provides that every Chinese person entitled by treaty or statute to come within the United States shall obtain the permission of and be identified as so entitled

> by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government.

The question in this case is whether a native-born Chinese merchant who has resided and conducted a business in French Indo-China, but who owes permanent allegiance to the Government of China and has never been naturalized under French law, is a subject of France or of China within the meaning of this statute, and whether the certificate provided for in Section 6 should be issued by the Chinese Government or some official designated by it, or by the French colonial government of Indo-China.

TREATIES AND STATUTES INVOLVED

Article II of the treaty between the United States and China of November 17, 1880 (22 Stat. 826, 827) is as follows:

> Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

Sections 6 and 15 of the Chinese Exclusion Act of May 6, 1882 (c. 126, 22 Stat. 58, 60, 61), were as follows:

> SEC. 6. That in order to the faithful execution of articles one and two of the treaty in this act before mentioned, every Chinese person other than a laborer who may be entitled by said treaty and this act to come within the United States, and who shall be about to come to the United States, shall be identified as so entitled by the Chinese Government in each case, such identity to be evidenced by a certificate issued under the authority of said Government, which certificate shall be in the English language or (if not in the English language) accompanied by a translation into English, stating such

right to come, and which certificate shall state the name, title, or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, and place of residence in China of the person to whom the certificate is issued and that such person is entitled conformably to the treaty in this act mentioned to come within the United States.

SEC. 15. That the words "Chinese laborers," wherever used in this act, shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.

The Act of July 5, 1884 (c. 220, 23 Stat. 115, 116, 118; U. S. C., Title 8, Secs. 265, 273), amended Sections 6 and 15 of the Act of 1882 to read as follows:

SEC. 6. That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title

or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States. If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: *Provided*, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word "merchant," hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be visaed by the indorsement of the diplomatic representatives of the United States in the foreign country from which such certificate issues, or of the consular

representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same. Such certificate visaed as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.

SEC. 15. That the provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power; and the words Chinese laborers, wherever used in this act shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.

STATEMENT

These two cases were consolidated and dealt with together in the Circuit Court of Appeals. The original records of the Bureau of Immigration were introduced in evidence in the United States District Court, and were transmitted by stipulation to the Circuit Court of Appeals (R. 16, Loi Hoa; R. 18, Phuong Con), and have been sent to and are on file with the Clerk of this Court, but have not been printed. Some of the facts stated are taken from the original immigration records.

Respondent Loi Hoa is a person of the Chinese race, born in China. He arrived at San Francisco October 31, 1925, coming from French Indo-China, and applied for admission as a merchant. Since 1919 he has resided at and conducted business as a merchant in Saigon, Cholon, a city in French Indo-China. During this period his wife and children have been living in his house in Chewon Village, in China, where he was born. He testified as follows:

> Q. Of what country are you a citizen or subject?—A. China.
>
> Q. Have you ever become naturalized or a subject of France?—A. No.

To evidence his qualifications for admission as a merchant he presented a certificate issued November 26, 1924, by the Chief of the Immigration Service of Cochin-China, an official of the French colonial government authorized by the Governor Gen-

eral of Indo-China to sign Chinese certificates in Cochin-China. The certificate was not issued by the Chinese Government, nor signed by any official or person authorized so to do by the Chinese Government.

Respondent Phuong Con is a person of the Chinese race, born in Sar Gar Hong, China. He went to French Indo-China in June, 1916, and remained there, conducting business, until November, 1924. His Section 6 certificate is dated November 26, 1924, and was issued at Saigon, Indo-China, by the Chief of the Immigration Service of Cochin-China and not by any consular or diplomatic officer of the Chinese Government or by any person authorized by the Chinese Government to issue such certificates. Having obtained his certificate, he returned to his native village in China in November, 1924, where he remained until he sailed for San Francisco, where he arrived November 18, 1925. During the time he was in French Indo-China his wife and children remained in his native village of Sar Gar Hong, China. He testified:

> Q. Of what country are you a citizen or subject?—A. China.
>
> Q. Have you ever renounced your allegiance to China in any manner?—A. No.
>
> Q. Have you ever become a citizen or subject of any other country except China?—A. No.
>
> Q. Have you ever served in the French Colonial Army or taken any steps by which

you would become a subject or citizen of France?—A. No.

Q. You are positive, are you, that you are a citizen of China?—A. Yes. I am a Chinese citizen and went to do business in Hainom.

Each certificate bore the visa of the American consul at Saigon, French Indo-China. Each of the respondents was excluded, on the ground that he had not submitted a Section 6 certificate issued by the government of which he is a citizen or subject. Respondents then instituted habeas corpus proceedings and the United States District Court held that their certificates were insufficient, and sustained demurrers to the petitions for the writs and denied the writs.

On appeal the judgments of the District Court were reversed, the Circuit Court of Appeals holding that, although these respondents are native-born citizens of China and have never been naturalized under French law, they were subjects of France within the meaning of Section 6 of the Chinese Exclusion Act, because they had been domiciled there for a number of years.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in holding that native-born Chinese who owe permanent allegiance to the Government of China and who have never been naturalized under French law are subjects of France within the meaning of Section 6 as amended by the Act of July 5, 1884, because for

some years they had been domiciled in French Indo-China, and in holding that the respondents may be admitted to the United States as merchants on certificates issued by French colonial officials of Indo-China, and in reversing the judgments of the District Court. (Petition for certiorari, p. 4.)

SUMMARY OF ARGUMENT

I. According to its primary and accurate meaning, the word "subject" denotes one who by birth or naturalization owes permanent allegiance to a government, and it was so used in Section 6 of the Chinese Exclusion Act of 1882 as amended in 1884. The word is used in that sense throughout our legislation. Its use to describe the relation to a government of an alien domiciled within its borders, and who is said to owe obedience and a temporary allegiance to such government while remaining within its territory, is limited and unusual. The purpose of Section 6, and its effect if construed to use the word "subject" in any but its primary and accurate sense, support the construction here contended for.

II. If there be a choice between two meanings of the word "subject," the practical construction of the statute will be decisive. For the forty-three years since its enactment Section 6 has been construed by the President, and by the four executive departments, State, Treasury, Justice, and Labor, which have dealt with it, and by the Chinese Government, to use the word "subject" to denote one who by birth or naturalization owes permanent al-

legiance to a country, and to require native-born Chinese, domiciled in countries foreign to China, to procure certificates from the Chinese Government and its authorized officials.

The decision of the Circuit Court of Appeals rejects the ordinary and usual meaning of the word "subject" and overturns the uniform executive construction of the statute during the forty-three years since its passage.

ARGUMENT

I

THE WORD "SUBJECT," AS USED IN SECTION 6 OF THE CHINESE EXCLUSION ACT, WAS USED IN ITS PRIMARY AND ORDINARY SENSE TO DENOTE ONE WHO BY BIRTH OR NATURALIZATION OWES PERMANENT ALLEGIANCE TO A GOVERNMENT

The first statute to carry out the provisions of the Chinese treaty of 1880 and otherwise restrict Chinese immigration, enacted May 6, 1882, provided only for certificates to be issued by the Chinese Government, certifying, among other things, to the place of residence in China of the person to whom the certificate was issued. Some courts soon thereafter held that the Act of 1882 did not forbid the admission of persons of the Chinese race who were subjects of governments other than China, and that Section 6 only required certificates from Chinese persons who had a place of residence in China. (*United States* v. *Douglas*, 17 Fed. 634; *In re Ah Lung*, 18 Fed. 28; *Case of the Chinese Merchant*, 13 Fed. 605.)

To make it plain that the Act was intended to exclude Chinese as a race regardless of their nationality, and to make it clear that certificates were required from subjects of China residing in other countries, the Act of 1884 was passed, which provided in Section 15 that its provisions should apply "to all subjects of China and Chinese, whether subjects of China or any other foreign power," and it amended Section 6 by inserting in reference to certificates the words "or of such other foreign Government of which at the time such Chinese person shall be a subject."

Extracts from the Congressional Record explaining the purpose of this amendment are set forth in the appendix (p. 47).

The question here presented is as to the sense in which the word "subject" was used in Section 6 as amended.

By common usage the word "subject" means a person who by birth or naturalization owes permanent allegiance to the government involved.

Dicey, Conflict of Laws, 2d ed., page 164, says that the term "'British subject' means any person who owes permanent allegiance to the Crown," the words "permanent allegiance" being used to "distinguish the allegiance of a British subject from the allegiance of an alien who, because he is within the British dominions, owes 'temporary' allegiance to the Crown."

Webster's New International Dictionary defines "subject" as follows:

> Specif., one who is subject to a monarch or ruler and is governed by his law; in a wider sense, one who lives in the territory of, and enjoys the protection of, and owes allegiance to, a sovereign power or state. Primarily and accurately speaking *subject* is used only to denote one who by birth, or now by naturalization, owes allegiance to a monarch or conquering state; but the term is loosely used, esp. in international law, to designate also a citizen (which see) of any other form of sovereign state, as of the United States, and even, in a still wider sense, a citizen of a commonwealth constituting a member of a sovereign state. (See Citizen, 3; Allegiance, 2.)

In describing one who owes by birth or naturalization permanent allegiance to a government, the word "subject" is ordinarily used when a monarch or emperor is involved, and the word "citizen" when the government is republican.

In substantially all legislation in the United States the word "subject" is used to denote one who owes permanent allegiance to a government by birth or naturalization. Some illustrations of this are as follows:

In Section 2 of Article III of the Constitution, relating to the jurisdiction of the Federal courts, it is provided that their jurisdiction shall extend to cases

> between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The word "subject" is there used to denote one who by birth or naturalization owes permanent allegiance to a foreign government. (See *Hammerstein* v. *Lyne*, 200 Fed. 165, 170.)

The word "subject" is so used in our naturalization laws, which provide that the applicant shall renounce allegiance "to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject." (Act of June 29, 1906, c. 3592, Sec. 4, 34 Stat. 596; U. S. C., Title 8, Sec. 381.)

The immigration laws, providing for deportation of aliens, have used the words "subjects" or "citizens" to denote permanent allegiance by birth or naturalization as distinguished from temporary allegiance resulting from domicil, in those provisions which designate the country to which the deported alien shall be returned. (Sec. 20, Act of February 5, 1917, c. 29, 39 Stat. 874, 890; U. S. C., Title 8, Sec. 156.)

One who maintains a residence and conducts a business in a foreign country is a subject of that government during the period in which he remains there in the sense that he is required to obey its laws. Halleck, International Law, vol. 1, p. 414. That aspect of nationality ordinarily arises in time of war in determining the status of captured ships and goods. In *The Pizarro*, 2 Wheat. 227, relied on by the court below, there was involved a vessel sailing under Spanish colors captured during the War of 1812. One question was as to the Spanish character of the ship, her owner being a merchant domiciled in a Spanish possession but a native

born British subject, and the question was whether he was a subject of Spain within the meaning of the treaty between the United States and Spain relating to reciprocal rights in time of war. The court said (pp. 245–246):

> As to the second objection, it assumes, as its basis, that the term "subjects," as used in the treaty, applies only to persons who, by birth or naturalization, owe a permanent allegiance to the Spanish government. It is, in our opinion, very clear, that such is not the true interpretation of the language. The provisions of the treaty are manifestly designed to give reciprocal and coextensive privileges to both countries; and to effectuate this object, the term "subjects," when applied to persons owing allegiance to Spain, must be construed in the same sense as the term "citizens," or "inhabitants," when applied to persons owing allegiance to the United States. What demonstrates the entire propriety of this construction is, that in the 18th article of the treaty, the terms "subjects," "people," and "inhabitants," are indiscriminately used as synonymous, to designate the same persons in both countries, and in cases obviously within the scope of the preceding articles. Indeed, in the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the

> country, while he resides in it; temporary, indeed, if he has not, by birth or naturalization, contracted a permanent allegiance; but so fixed that, as to all other nations, he follows the character of that country, in war as well as in peace. The mischiefs of a different construction would be very great; for it might then be contended, that ships owned by Spanish subjects could be protected by the treaty, although they were domiciled in a foreign country, with which we were at war; and yet the law of nations would, in such a predicament, pronounce them enemies. We should, therefore, have no hesitation in overruling this objection, even if it were proved that Mr. Hibberson was not a naturalized subject of Spain; but we think the presumption very strong, that he had become, in the strictest sense of the words, a Spanish subject.

(See argument of the Attorney General at page 228.)

In this case the British merchant domiciled in Spain was held to be a subject of Spain within the meaning of this treaty because of the language of the treaty and its purpose.

In *Carlisle* v. *United States*, 16 Wall. 147, an appeal from the Court of Claims, it is stated that the claimants were subjects of the Queen of Great Britain, but had been residents within the United States prior to the war of the rebellion and during its continuance, and in 1864 were the owners of some bales of cotton in Alabama, seized by naval

officers of the United States. They brought their suit in the Court of Claims, which dismissed their case because they had given aid and comfort to the rebellion. This court held that when domiciled in the United States they owed a temporary allegiance to our government, saying (p. 154):

> By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.

Having held that a proclamation of amnesty had cleared them of the offense of treason, the Court then held that the claimants were citizens and subjects of Great Britain and authorized to maintain the suit since the Government of Great Britain gave similar rights to citizens and subjects of the United States. (See Sec. 155, Judicial Code; U. S. C., Title 28, Sec. 261.) The words "citizen" or "subject" as used throughout the opinion in that case relate to those who owe permanent allegiance

through birth or naturalization, as distinguished from temporary allegiance arising from domicil.

No doubt the word "subject" is sometimes used in its broader sense to describe one who, through domicil within the limits of a nation, is subject to its laws and owes it temporary allegiance, but in its primary, accurate, and ordinary sense it relates to one who owes permanent allegiance through birth or naturalization. That such is the ordinary meaning of the word is convincingly disclosed by its use in legislation, executive rulings, and diplomatic correspondence set forth in this brief under the subject of practical construction.

That nothing in the purpose or operation of the statute here under consideration requires that the word "subject" be construed to describe the relation to a country of an alien domiciled within its limits is confirmed by the following considerations:

First. Residence and domicil are difficult matters to decide upon and involve intricate inquiries into the intentions and places of abode of the persons concerned. Immigration officers in dealing with Chinese claiming entry as merchants or students are required at the outset to decide whether their certificates are issued by the proper authorities. If citizenship by birth or naturalization is the test, it may ordinarily be readily applied, but if domicil or residence is the test, great difficulties immediately arise. In dealing with these cases the immigration officials have difficulty enough to

determine the facts without having a new subject of controversy introduced.

Second. Representatives of foreign nations in which native-born Chinese are domiciled for the time being, have not the same means of obtaining information respecting their antecedents and occupations necessary to determine intelligently their right to admission to the United States, as have the Chinese Government and its representatives.

Third. It will be noted that Section 6 requires that the government issuing the certificate shall give its permission to the Chinese to go and remain abroad in the United States. This suggests that the government to which the Chinese owe permanent allegiance by birth or naturalization is the one involved.

The national character which a man acquires by residence is adventitious and ceases by nonresidence. The French Government has no further interest in a native-born Chinese who comes to the United States merely because he may have previously been domiciled in France.

In dealing with Chinese presenting such certificates diplomatic complications result unless the dealings are with the government to which he owes permanent allegiance. In deportation cases it is often necessary to return the deported alien to the country of which he is a native-born or naturalized subject, as distinguished from the country from which he came.

Fourth. Anomalous situations arise if the word "subject" in Section 6 be construed to mean "resident." Section 13(c) of the Immigration Act of 1924 (c. 190, 43 Stat. 153, 162; U. S. C., Title 8, Sec. 213(c)), provides that no alien ineligible to citizenship shall be admitted to the United States, unless he is not an immigrant as defined in Section 3 (U. S. C., Title 8, Sec. 203). Section 3 excludes from the definition of immigrant—

> an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

Chinese merchants are ineligible to citizenship and are inadmissible unless pursuant to such a treaty. We have in the treaty of 1880 such a treaty with China. We have no treaty with France that permits persons of the Chinese race, native-born subjects or citizens of China domiciled for the time being in French territory, to enter the United States. The result is that to obtain admission these respondents must claim they are subjects of China within the meaning of that word as used in the Chinese treaty of 1880, but are subjects of France within the meaning of Section 6 of the Act of 1884, intended to execute the terms of the treaty.

These considerations indicate that there are substantial reasons for the view that the word "subject" in Section 6 was used in its primary and accurate sense to denote the relation to a country of one who by birth or naturalization owes it per-

manent allegiance, and open the way for the consideration of the practical construction given the statute which should be conclusive of its meaning.

II

THE PRACTICAL CONSTRUCTION OF SECTION 6 SINCE ITS ENACTMENT IN 1884 HAS UNIFORMLY AND CONSISTENTLY GIVEN TO THE WORD "SUBJECT" THE MEANING CONTENDED FOR BY THE PETITIONER

Immediately after the passage of the Act of 1884, and on December 6 of that year, the Secretary of the Treasury issued a circular providing that—

> Chinese subjects, not laborers, desiring to come to the United States from countries other than China, may do so on production of a certificate corresponding to that required by section 6 of the Act of July 5, 1884, to be issued by a Chinese diplomatic or consular officer, or if there be no such Chinese officer stationed at such port, on a like certificate to be issued by a United States consular officer. (Foreign Relations, 1885, p. 184.)

In August, 1885, there arose the case of Chinese merchants who were native born subjects of China domiciled and residing in Hongkong, a British possession. Both the Secretary of State of the United States and the Chinese Government dealt with the case as if, being native born subjects of China, although domiciled in Hongkong, the merchants were required to present a certificate not from the British Government but from the Chinese Government or, in the absence of a Chinese official at Hong-

kong, from a United States consul. (Foreign Relations, 1885, pp. 184–186.)

On January 14, 1885, Treasury circular No. 7 was issued, providing as follows:

> (4) Chinese persons other than laborers coming to the United States for the first time from China can be permitted to enter the United States only upon the production of the certificate prescribed by section 6 of the act of July 5, 1884, such certificate being the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States.
>
> (5) Chinese subjects, not laborers, desiring to come to the United States from countries other than China may do so on production of a certificate corresponding to that required by section 6 of the act of July 5, 1884, to be issued by a Chinese diplomatic or consular officer, if there be one at the port of departure, countersigned by a United States consular officer; *or, if there be no such Chinese officer stationed at such port, on a like certificate to be issued by a United States consular officer.* (Italics ours.) (Foreign Relations, 1885, pp. 192, 193.)

On April 6, 1886, President Cleveland sent a special message to Congress (Richardson's Messages, Vol. VIII, p. 390), in which he took the position that Section 6, as amended by the Act of 1884, provided only for certificates for Chinese subjects departing from China, and persons of the Chinese race, being subjects of a foreign government other

than China, who might depart for the United States from a port of such foreign government, and suggested that provision be made for issuing certificates to Chinese persons who, remaining Chinese subjects, were domiciled in other countries where there were no Chinese officers stationed who could give a certificate from the Chinese Government. He said (pp. 392, 393):

> Chinese merchants have trading operations of magnitude throughout the world. They do not become citizens or subjects of the country where they may temporarily reside and trade; they continue to be subjects of China, and to them the explicit exemption of the treaty applies. Yet if such a Chinese subject, the head of a mercantile house at Hong Kong or Yokohama or Honolulu or Havana or Colon, desires to come from any of these places to the United States, he is met with the requirement that he must produce a certificate, in prescribed form and in the English tongue, issued by the Chinese Government. If there be at the foreign place of his residence no representative of the Chinese Government competent to issue a certificate in the prescribed form, he can obtain none, and is under the provisions of the present law unjustly debarred from entry into the United States. His usual Chinese passport will not suffice, for it is not in the form which the act prescribes shall be the sole permissible evidence of his right to land. And he can obtain no such certificate from the Government of his place of residence, be-

cause he is not a subject or citizen thereof "at the time," or at any time.

There being, therefore, no statutory provision prescribing the terms upon which Chinese persons resident in foreign countries but not subjects or citizens of such countries may prove their status and rights as members of the exempted classes in the absence of a Chinese representative in such country, the Secretary of the Treasury, in whom the execution of the act of July 5, 1884, was vested, undertook to remedy the omission by directing the revenue officers to recognize as lawful certificates those issued in favor of Chinese subjects by the Chinese consular and diplomatic officers at the foreign port of departure, when visced by the United States representative thereat. This appears to be a just application of the spirit of the law, although enlarging its letter, and in adopting this rule he was controlled by the authority of high judicial decision as to what evidence is necessary to establish the fact that an individual Chinaman belongs to the exempted class.

* * * * *

The complaint of the Chinese minister in his note of March 24, 1886, is that the Chinese merchant Lay Sang, of the house of King Lee & Co., of San Francisco, having arrived at San Francisco from Hong Kong and exhibited a certificate of the United States consul at Hong Kong as to his status as a merchant, and consequently exempt under the treaty, was refused permission to

land and was sent back to Hong Kong by the steamer which brought him. While the certificate he bore was doubtless insufficient under the present law, it is to be remembered that there is at Hong Kong no representative of the Government of China competent or authorized to issue the certificate required by the statute. The intent of Congress to legislate in execution of the treaty is thus defeated by a prohibition directly contrary to the treaty, and conditions are exacted which, in the words of the Supreme Court hereinbefore quoted, "it was physically impossible to perform."

This anomalous feature of the act should be reformed as speedily as possible, in order that the occurrence of such cases may be avoided and the imputation removed which would otherwise rest upon the good faith of the United States in the execution of their solemn treaty engagements.

GROVER CLEVELAND.

No legislation was enacted as suggested, as the difficulty was remedied by having the Chinese Government designate its diplomatic and consular or other agents in foreign countries to issue certificates for Chinese subjects domiciled in such foreign countries.

On May 29, 1891, the Chinese Minister called to the attention of the State Department the fact that two Chinese merchants holding Section 6 certificates, issued to them by the Chinese consul at Yokohama, Japan, had been refused admittance on the

ground that Chinese consuls in foreign countries had no right to issue certificates to Chinese merchants residing in their ports. The Chinese Minister, on June 2, 1891, addressed a letter to the State Department as follows:

Mr. Tsui to Mr. Wharton

CHINESE LEGATION,
Washington, June 2, 1891.

SIR: Confirming the statement made by me to you in our interview of yesterday, I have the honor to inform you that the Imperial Chinese Government, in order to facilitate a more perfect compliance with the terms of section 6 of the law of the Congress of the United States of July 5, 1884, has authorized the consuls of China in foreign countries to issue, in behalf of their Government, to the exempt class of Chinese residents in said countries the certificate of identity required by said law.

I shall therefore be greatly obliged if you will communicate the foregoing fact to the honorable Secretary of the Treasury, in order that he may issue such general instructions to the collectors of customs of ports of the United States as shall secure a recognition by them of the validity of certificates of Chinese consuls of the character named.

I am, etc.,

TSUI KWO YIN.

The merchants were thereupon admitted, and upon the matter being taken up by the Secretary of State with the Secretary of the Treasury the

latter wrote the State Department as follows (Foreign Relations, 1891, pp. 457–460):

Mr. Foster to Mr. Blaine

TREASURY DEPARTMENT,
Washington, June 12, 1891.

SIR: I have the honor to acknowledge the receipt of your letter of the 6th instant, transmitting a copy of a note from the Chinese minister at this capital, in which he states that the Imperial Government, in order to facilitate a more perfect compliance with the terms of section 6 of the act of May 6, 1882, as amended by the act of July 5, 1884, has authorized the consuls of China in foreign countries to issue, in behalf of their Government, to the exempted or privileged class of Chinese residents in such countries the certificate of identity required by said section, and requests that this Department may give such general instructions to collectors of customs in the United States as shall secure a recognition by them of the validity of certificates of Chinese consuls of the character named.

The language of the section of law above referred to is as follows, viz:

(Here follows copy of section 6.)

In the opinion of this Department, the delegation of such authority by the Chinese Government to its consuls in foreign countries is not incompatible with the intent of the above section, and, inasmuch as this Department has already recognized such dele-

gation of authority in its telegram of the 1st instant, addressed to the collector of customs at San Francisco, in the case of two Chinese merchants and one student, subjects of China, arriving at that port per *City of Pekin*, holding certificates from the Chinese consul at Yokohama, properly visaed by the American consul, I will thank you to furnish the Chinese minister with a copy of this letter, and inform him that this Department perceives no objections to the acceptance by collectors of customs of certificates of the character mentioned, issued by Chinese consuls in other countries to Chinese subjects, and that action will be taken accordingly.

It may be mentioned that Department's circular of January 14, 1885, paragraph 5, as amended by its letter of July 13, 1885, contemplates the issuance of such certificates by Chinese diplomatic and consular officers to Chinese subjects, not laborers, desiring to come to the United States from countries other than China.

It is suggested that United States consular officers be advised of the fact of such delegation of authority.

Respectfully yours,

CHARLES FOSTER.

The following diplomatic correspondence in 1893 shows a mutual understanding of the governments of the United States and of China that native born Chinese citizens, domiciled abroad, were to be considered subjects of China within the meaning of

Section 6 of the Act of July 5, 1884 (Foreign Relations, 1893, pp. 260–262):

(Received October 11.)

Mr. Yang Yu to Mr. Gresham

CHINESE LEGATION,
Washington, October 10, 1893.

SIR: I have the honor to state that my predecessors, through interviews and correspondence, obtained the recognition by the collectors of customs, under regulations and instructions prescribed by the Secretary of the Treasury, of certificates of identity to the exempt class of Chinese persons, in order to facilitate a more perfect compliance with section 6 of the act of Congress approved July 5, 1884, and the Imperial Chinese Government, in accordance with an understanding so made and accepted by both governments, authorized the consuls of China in foreign countries to issue, in behalf of their own Government, to such exempt class of Chinese residents in said countries the certificates of identity required by said law, and such certificates have been issued by such consuls and recognized by the collectors of customs until a very recent date. In this connection I have the honor to say that I am in receipt of a note from the Chinese consul at New York City, and also of a petition signed by the Chinese board of trade and by twenty-four merchants of New York City, complaining that the customs officers decline to recognize and indorse such certificates, and

they claim that their action in this respect is controlled by orders from the Secretary of the Treasury.

The State Department disclaimed such action. On January 8, 1894, Attorney General Olney rendered an opinion (20 Op. A. G. 693) to the effect that consular officers of China in a foreign country other than China could issue Section 6 certificates. He said (p. 694):

> The requirement of this section is that the "permission" to and "identification" of the Chinese person shall be "evidenced by a certificate issued by such Government." The Government can act, in the issuance of such certificates, only through and by its officers and agents. If it chooses to select its consular officers in foreign countries as such officers and agents it has the right so to do, and it is not competent for this Government to question the propriety or fitness of the choice.
>
> I am of the opinion that such consular officers of China, being duly empowered by the Chinese Government, may properly issue the certificates in question.
>
> 2. Certificates issued by the duly authorized consular officers of China in foreign countries and accurately conforming in their contents to the requirements of section 6 are the certificates contemplated by the law.

Then came the treaty with China of December 8, 1894. (28 Stat. 1210.) Article III of this treaty contained the following provision (p. 1211):

> **The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may *produce a certificate from their Government or the Government where they last resided* visaed by the diplomatic or consular representative of the United States in the country or port whence they depart.** (Italics ours.)

While the Act of 1884 had provided that the certificates should be issued by the Chinese Government or of such other foreign country of which such Chinese person shall be a subject, the treaty of 1894 provided that the certificate for Chinese subjects entitled to admission into the United States should come "from their Government or the Government *where they last resided.*" This treaty, which ceased by its terms to operate in 1904, allowed certificates from the government of residence to be issued to Chinese subjects, and during the period of ten years in which the treaty operated such certificates were accepted.

In 21 Op. A. G. 347, rendered May 20, 1896, Acting Attorney General Holmes Conrad, dealing with the case of Chinese subjects resident in the British colony of Hong Kong, held not only that the treaty of 1894 permitted the use of a certificate from the

Colonial Government, but that the requirements of the treaty would not be satisfied by one from the Chinese Government. This opinion was sound in so far as it held that such a certificate was sufficient. It went beyond the necessities of the case and was open to question and was thereafter questioned in so far as it held that the treaty of 1894 required that the certificate come from the government of residence. The opinion does, however, contain matter bearing on the present question (p. 348):

> The act of July 5, 1884, chapter 220, section 6, requires that certificates in similar cases should be issued by the Chinese Government, "or of such other foreign Government of which at the time such Chinese person shall be *a subject*." Prior, therefore, to the treaty of 1894 a certificate from the authorities at Hong Kong would have been insufficient in the cases now under consideration, and a certificate from the Chinese Government would have been necessary.

This opinion was confirmed by Acting Attorney General Boyd on August 31, 1898 (22 Op. A. G. 201). He said (p. 204):

> My predecessor was of the opinion (21 Opin. 347) that the provisions of this article of the treaty of 1894 are self-executing and are a part of the supreme law of the land, and he holds in effect, therefore, that while prior to the treaty of 1884 a certificate from the foreign authorities as to privileged Chinese subjects resident within a foreign jurisdiction would have been insufficient, and a

certificate from the Chinese Government or its accredited consular officials would have been necessary, the treaty being subsequent to the act of 1884 has modified the requirements thereof, so that the certificate must now be issued in such cases by the foreign government and not by officials of China. This opinion evidently regards the treaty as mandatory on this point, and suggests no alternative under which such an applicant for admission might properly produce either the certificate of consular officials of China or the certificate of the foreign government. I concur in this reasoning and conclusion. There is no fundamental inconsistency or repugnancy between the act and the treaty, nor between the opinions of my predecessors considering them respectively, nor has any radical change in procedure resulted from the partial modification of the act by the treaty. The certificate is the same in its contents and incidents, but the source from which it issues in the case which we are considering has been transferred from the Chinese Government to the foreign government of residence. The whole scope of the question may be summarized as follows:

Chinese subjects of the permitted classes coming into the United States from China must produce the certificate of the Government of China, and coming from other foreign countries, in which they are residents, must now produce, under the treaty of 1894, the certificate of the government of such

countries, and not, as under the act of 1884 (as considered in 20 Opin. 693), the certificate of consular or other proper officials of China. It lies beyond our inquiry, as I have intimated, to determine whether, granting that under the act of 1884 the certificate of a Chinese person being the subject of another foreign government must be issued by that government when he comes from its jurisdiction into the United States, it should be issued by that government or by the government of residence when he resides elsewhere and proceeds therefrom to the United States. To such Chinese persons the treaty of 1894 does not legally extend, and it has not been determined, so far as I am aware, whether as to them the test of relation as subject or citizen indicated by the act of 1884 or the test of residence by an equitable application (so to speak) of the principle of the treaty is to be invoked. It may be that this latter question is not of practical moment at present, or that you have already in the regulations and practice of your Department disposed of it.

I therefore respond to your request by stating that, in my opinion, there is no authority to be derived from our existing laws granting to consular officers of China in a foreign country the right to issue the certificates prescribed by section 6 of the act of July 5, 1884.

Very respectfully,

JAS. E. BOYD,
Acting Attorney General.

These opinions hold clearly that Section 6 of the Act of July 5, 1884, used the word "subject" as describing the relation of one who owed permanent allegiance by birth or naturalization as distinguished from temporary allegiance resulting from residence or domicil. In a letter of November 7, 1898, from Mr. Wu, the Chinese Minister at Washington, to Mr. Hay, the Secretary of State, it was said, referring to the opinion of Acting Attorney General Boyd (Foreign Relations, 1899, pp. 190–191):

> The Acting Attorney General appears to have based his opinion, not upon any law passed by the lawmaking power of the United States, but upon Article III of the treaty between China and the United States signed March 17, 1894. It is admitted that previous to the conclusion of that treaty, and for some time after the date of that treaty, it was held that under the laws now, as then, in force on this subject, the certificate of the Chinese consul in the foreign country was a compliance with section 6 of the act of 1884. This is forcibly stated by your predecessor, the Hon. Richard Olney, when acting as Attorney General, and I am not aware that he changed his opinion after he became Secretary of State.
>
> It is now contended that section 6 of the law was modified by the ratification of the treaty because of this provision in its Article III: "To entitle such Chinese subjects as are above described to admission into the

United States they may produce a certificate from their Government *or the government where they last resided*, viséed by the diplomatic or consular representative of the United States in the country or port whence they depart." Section 6 of the law provided that in all cases the Chinese Government (through its consul duly empowered) should issue the certificate to *Chinese subjects* residing in foreign countries; and that only in cases where Chinese had become *naturalized subjects* of the foreign country was the government of that country to issue the certificate. Such was the legislative requirements enacted under the treaty of 1880, but it was found in practice that this requirement worked hardships, for there were considerable numbers of Chinese subjects residing in countries where there were no Chinese consuls. Hence, when the unratified treaty of 1888 was framed, it was agreed that this inconvenience should be overcome by authorizing, in the alternative, the issuance of such certificates by the Chinese consul as was then permitted by existing law or by the government of the foreign country where they (the Chinese) resided, and for that purpose the clause above quoted was inserted in Article III of that treaty, which was textually readopted and inserted in the treaty of 1894.

That such was the intention of the American as well as of the Chinese negotiators of the treaties is made manifest by the action of the Secretaries Bayard and Gresham. After the ratification by the Senate of the United

States of the treaty in 1888, a bill was introduced in Congress, doubtless at the instance of Secretary Bayard, and passed by that body, for the purpose of putting the treaty in operation, in which section 6 of the law of 1884 was reenacted almost literally, with the clause relating to the admission of Chinese other than laborers, who were required to "first obtain the permission of the Chinese Government or other government of which they may at the time be a citizen or subject." Certainly if Secretary Bayard understood Article III of the treaty to require all Chinese residing in foreign lands to obtain a certificate from the government where they resided, and not from the Chinese Government through its consul, he would have seen that such requirement was inserted in the law. So also it will be noted that after the treaty of 1894 was ratified a bill to carry it into operation was introduced in the Senate (No. 2309, 53d Cong. 2d sess.), which provided that section 6 of the act of July 5, 1884, was to be reenacted. The bill, I am informed, did not become a law because it was held that the treaty did not repeal or affect the existing laws, which was an additional evidence that Article III did not modify section 6.

Moreover, Article III does not bear the narrow sense which it is attempted to put to it. It does not mean that, in the case of Chinese subjects resident in a foreign country, a certificate issued from that country only and no other can be sufficient; for if

> that had been the intention of the negotiators of the treaty, they would have made it clear by putting that such Chinese subjects must produce a certificate from their Government or, *if residing in a foreign country*, the government where they last resided, etc. It is plain, therefore, from the natural construction of the sentence that the option is left to such Chinese subjects of obtaining a certificate either from their Government or the government where they last resided. It is one of the rules of interpretation that a right once conferred on a person can not be taken away by implication without express and unequivocal provisions to that effect, much less by a narrow and one-sided construction, as it is attempted in the case under consideration; and, with all due deference to the Acting Attorney General, I respectfully submit that his ruling should not be followed.

While the treaty of 1894 seems to have authorized the use of Section 6 certificates issued by foreign countries in which Chinese subjects were domiciled, Mr. Wu seems to have made a persuasive argument that the treaty, while in effect, permitted Chinese subjects domiciled abroad outside of China to produce such certificates, but left them the option of presenting certificates from the Chinese Government. This question aside, the opinions and diplomatic correspondence show the understanding of this Government and of the Chinese Government and of the Department of State and the Department of Justice that Section 6 of the Act of July 5,

1884, required Chinese nationals domiciled in foreign countries other than China to present certificates from their own Government or its authorized representatives, and that the word "subject" in this Act was used to describe those owing permanent allegiance to a government by birth or naturalization as distinguished from temporary allegiance through domicil.

While the convention of 1894 remained in effect, certificates from the government of residence were accepted. The treaty of 1894 by its own terms continued for only 10 years and was not renewed. It affected the operation of Section 6 of the Act of 1882, as amended, only during that period. When the treaty expired by limitation, Section 6 of the Act of 1882, as amended in 1884, again became operative. (For legislation extending the operation of this statute see the Appendix hereto, page 55.) The permission given by the treaty of 1894 to use certificates from the government of residence was thus withdrawn, and a certificate from the government of which the Chinese was a subject required by the Act of 1884 and permitted (we think with Mr. Wu) by the convention of 1894 was then necessary. Thereupon, on April 15, 1905, a consular instruction was issued by the Secretary of State (MS. Instructions to Diplomatic and Consular officers, Vol. 6), which read as follows:

> Under the convention of December 8, 1894, between the United States and China, Chinese persons of the exempt class were ad-

> mitted to this country by a certificate issued by the government of which they were subjects or the government where they last resided. This convention expired by limitation December 8, 1904, and section 6 of the act of Congress approved July 5, 1884, is the law now in force relating to the admission to this country of Chinese persons of the exempt class. * * * The only persons at present authorized to issue certificates to Chinese subjects are the superintendents of customs (taotai) located within the Empire of China. A Chinese person who is by birth or naturalization a subject of some other country can obtain his certificate only from the government to which he owes his allegiance.

In passing, attention is called to the Act of May 5, 1892 (c. 60, 27 Stat. 25; U. S. C., Title 8, Sec. 285), which in Section 2 provided that Chinese persons, or persons of Chinese descent, when adjudged not entitled to remain in the United States, should be removed to China, unless they make it appear that they "are subjects or citizens of some other country."

On May 3, 1905, there were issued by the Department of Commerce and Labor, Chinese exclusion regulations, which contained the following rule:

> Rule 33. The officers whose titles are given below have been authorized by their respective Governments to issue to Chinese *subjects, or citizens* of such Governments the certificates prescribed by section 6 of the act

approved July 5, 1884. Until other officers are designated by foreign Governments only certificates issued by those named shall be accepted as conforming to the requirements of law; and Chinese persons of the exempt classes coming from countries which have not designated officers to issue such certificates to Chinese *subjects*, or *citizens*, thereof can not be admitted to the United States.

The list of officers mentioned in this rule discloses no officers of the Chinese Government authorized to issue certificates outside of China. The regulations of February 5, 1906, issued by the Department of Commerce and Labor, contained Rule 30, which was identical with the first sentence of the above-quoted Rule 33 of 1905; and in it, again, the list of officers authorized by their respective governments to issue Section 6 certificates contained no Chinese officers outside of China. The regulations issued by the Department of Commerce and Labor under date of February 26, 1907, contained again Rule 30, identical with the first sentence of Rule 33 of 1905. Here, for the first time, the list of officers designated by their respective governments to issue Section 6 certificates included Chinese diplomatic or consular officers in countries foreign to China. This regulation is set forth in the appendix hereto (p. 57). The regulations issued by the Department of Commerce and Labor on April 18, 1910, contained, in Rule 10, a regulation the same as the first sentence of Rule 33 of 1905, above quoted. It also contained a list of Chinese officers in countries

foreign to China authorized to issue Section 6 certificates. The regulations of 1910 contained also the following:

> Rule 11. (*a*) Chinese persons of the exempt classes who are citizens or subjects of other insular territory of the United States than the Territory of Hawaii shall, if they desire to go from such insular territory to the mainland or from one insular territory to another, comply with the terms of section 6 of the act approved July 5, 1884. The certificate prescribed by said section shall be granted by officers designated for that purpose by the chief executives of said insular territories, and the duties thereby imposed upon United States diplomatic and consular officers in foreign countries in relation to Chinese persons of the said classes shall be discharged by the officers in charge of the enforcement of the Chinese exclusion acts at the ports, respectively, from which any members of such excepted classes intend to depart from any insular territory of the United States: *Provided, however,* That the privilege of transit shall be extended to all persons other than laborers, as provided in Rule 18.
>
> (*b*) As *all persons* who were citizens of the Republic of Hawaii on August 12, 1898, are citizens of the United States, persons of the Chinese race claiming such status may be admitted at either mainland or insular ports of entry upon producing evidence sufficient to establish such claim. *Subjects of the Chinese Empire of the exempt classes residing*

in Hawaii must obtain certificates from the representative of their own Government (the Chinese consul, Honolulu), and such certificates must be visaed by the inspector in charge of the immigration service in said islands instead of by a diplomatic or consular officer.

(*c*) The governor of the Philippine Islands having, by executive order No. 38, of September 23, 1904, designated the collector of customs, Manila, to *issue* to Chinese citizens of those islands the certificate provided by section 6 of the act of July 5, 1884, and it being impracticable to require that such certificates shall be viséed, officers at ports of entry for Chinese will regard certificates issued to such Philippine citizens in the same manner as certificates issued by officials of foreign countries and viséed by American diplomatic or consular officers. Certificates issued by the Chinese consul-general, Manila, to *subjects of the Chinese Empire* residing in the Philippines will be viséed by the collector of customs at Manila, and when so viséed will be accorded the usual consideration. (Italics ours.)

This is a clear declaration that subjects of the Chinese Empire residing outside of China must obtain certificates from officers of their own government. This regulation of 1910 was repeated in the editions of 1911 and 1912 and in the regulations of the Department of Labor approved January 24, 1914, October 15, 1915, October 27, 1916, and May 1, 1917, and in the edition of October, 1920, and in the

last edition, containing the rules of October 1, 1926, the latter containing an extended list of countries other than China in which Chinese officials have been designated by the Government of China to issue Section 6 certificates to Chinese nationals residing in other countries than China. It is to be noted that in the rules issued by the Department of Labor approved January 24, 1914, and those thereafter issued, the phrase "citizens of the Chinese Republic" is substituted for the phrase "subjects of the Chinese Empire" appearing in the earlier editions, showing that the word "subject" was used in connection with a monarchy or empire, as the word "citizen" is used in relation to a republic, and as describing the relation of one who owes permanent allegiance by birth or naturalization.

Many other instances of practical construction might be cited. We have found only one which, in the slightest degree, breaks the clear consistency and continuity of the practical construction recounted.

Under date of May 5, 1908, the State Department approved and issued for the use of diplomatic officers of the United States a digest of the treaty, laws, and regulations governing the admission of Chinese, prepared by Mr. Frederick D. Cloud, American Vice Consul General at Shanghai. This digest, referring to Section 6 of the Act of July 5, 1884, said:

> According to the stipulations of the above statute every Chinese person, other than a

> laborer, entitled to enter the United States, must, before proceeding to the United States, obtain a certificate from a properly authorized official of the government under which the applicant *is domiciled*, and which said certificate must be duly examined or viséed by the consular representative of the port or district from which the person named in the certificate is about to depart. (Italics ours.)

This inaccuracy may be explained by the fact that the convention of 1894, becoming inoperative in 1904, authorized certificates from the government of domicil or residence, and the author of this digest may have overlooked the fact that the use of such certificates had expired with the expiration of the treaty. Under the circumstances, this statement is of little significance, especially as the digest refers later to the Chinese officers in countries foreign to China, authorized to issue certificates under Section 6, and shows a loose treatment of the subject.

The foregoing review shows that the practical construction by the President of the United States, the Department of State, the Treasury Department, the Department of Justice, and the Department of Labor has consistently adhered to the view for nearly forty-three years that the word "subject" as used in Section 6 of the Act of 1884 is used in its primary and accurate sense to denote one who by birth or naturalization owes permanent allegiance to the government in question, and that a native-born

Chinese who has retained his permanent allegiance to the Government of China and who has never been naturalized in a foreign country is a subject of China within the meaning of the Act, and not of the nation in which he may have maintained a domicil or conducted a business.

The conclusion reached by the Circuit Court of Appeals rejects the ordinary meaning of the word "subject," adopts a construction which is out of line with the purpose of the Act and causes confusion in its application, and is contrary to the established practice and understanding of the officers of the Government of the United States who have been charged with the enforcement of this Act.

The judgments of the Circuit Court of Appeals should be reversed and those of the United States District Court affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
O. R. LUHRING,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.
F. M. PARRISH,
Attorney.

NOVEMBER, 1927.

APPENDIX

LEGISLATIVE HISTORY OF THE ACT OF 1884

In reporting out the bill which ultimately became the Act of 1884, the majority report of the Committee on Foreign Affairs of the House stated (H. Rep. 614, 48th Cong., 1st Sess.):

> This act, prepared by the combined representatives of three States and two Territories, the portions of the United States now most affected by Chinese immigration, is presented for the sole purpose of perfecting the machinery of exclusion already in existence under the act of 1882. This act was intended by its originators and supporters to exclude Chinese laborers, coming from any and every port, from our shores.
>
> To show that it has failed so to do your committee have only to cite the decision of Judges Lowell and Nelson, of the United States circuit court in Massachusetts, to the effect that a Chinese laborer, born on the island of Hong Kong after its cession to Great Britain, is not within the provisions of the act of 1882, and the decision of Justice Field, above cited, that such Chinese laborer is within said provisions, to show the necessity of amendment.
>
> Your committee believe that this bill should be enacted into a law, so that hereafter there can be no diversity of opinion as to the full meaning and intent of the act of 1882, and litigation on this subject be brought to an end.

The minority report (idem) contains the following views with respect to the scope of the Act :

> The act of 1882 was entitled "An act to execute certain treaty stipulations relating to Chinese." Of course these treaty stipulations were with China; they did not affect the subjects of England or France, although they might happen to be Chinese; but this amendatory bill boldly supplies the deficiency, if any exists. By referring to section 4 of the bill, we find that the provisions are no longer confined to the treaty stipulations merely, but include the provisions of the acts as well as the stipulations of the treaty. It may accord with the wishes of some members of the House to forbid the half million of English subjects who are of Chinese blood to set foot on our soil, but it would seem to be worthy of serious consideration before such a step is taken whether any exigency has been found to justify it.
>
> * * * * *
>
> But section 6 contains more radical amendments. Under it the Chinese persons who may be entitled "by said treaty or this act" to come within the United States must procure a certificate of permission and identification not only from the Chinese Government, by treaty with which it is claimed we have the right to make these restrictive regulations, but also "of such other foreign Government of which at the time such Chinese person shall be a subject."
>
> This certificate must state the nature, character, and estimated value of the business carried on by the Chinese person applying for it, if he be a merchant. If sought for the purpose of travel for curiosity it must state whether he intends to pass through or travel within the United States, together

with his financial standing in the country whence he comes. If the applicant is coming here to study, the certificate must state the nature and character of the studies and at what place or places he will pursue them, with the probable length of time required for the completion of the same.

These curious provisions suggest the reflection as to just what the English authorities at Singapore or Hong Kong will do if by any chance any Chinese-English subjects in those cities, where they constitute a most intelligent and wealthy portion of the population, should wish to travel in the free republic, or, perchance, to send their sons to be educated in her schools. Would it not be well to consider our ability to enforce such regulations before we enact them into law? It is claimed in some quarters that we are not overzealous in shielding our citizens when amenable to English law. Shall we be more zealous and efficient in enforcing such laws as this against English subjects?

It is perhaps worthy of notice that this section not only attempts to make more stringent restrictive regulations against Chinese laborers, subjects of China, with whom we have some show of right, under a treaty, to make them, and against the Chinese subjects of other nations, with whom we have no such treaty stipulations but that its other provisions unquestionably exceed the scope of the treaty with China.

* * * * *

* * * And, where is the exigency which justifies us in disregarding our treaties with all the other nations among whose subjects are to be found persons of the Chinese race.

When the bill was under consideration by the Committee of the Whole House, Mr. Rice, a member of the Committee which reported the bill, said (Cong. Rec., 48th Cong., 1st Sess., Vol. 15, Part 4, pp. 3756 and 3773):

> No merchant shall come here unless he has obtained permission of the government of which he is a subject, and a certificate from that government stating a great many particulars in regard to him.
>
> * * * * *
>
> But having gone over all that pertains to the old act, let me now come to what is the heart and the kernel of this act. That is all to be found in the fifteenth section of it. I beg the members of this House to listen to this section 15:
>
> "The provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or of any other foreign power."
>
> That is the whole substance of this amended act; that is all that is in it, really, that is new or that is not absolutely puerile and frivolous.
>
> "The provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or of any other foreign power."
>
> Now, it happens that there are two British provinces in which Chinese dwell. There is the province of Hong Kong, ceded to Great Britain in 1841; its capital, Victoria; population in 1872, Europeans and Americans, 6,000; Chinese, 115,000. There are 115,000 Chinamen that have not been kept out by any act we have adopted heretofore. Singapore was ceded to the British in 1824. Its population in 1871 was 74,000, of whom 54,000

were Chinese. In all nearly 200,000 Chinese who possibly would not be kept out by the act of 1882. Why not? Because it happens that they are subjects of the British Empire and that over them floats the British flag. One of them was let into Massachusetts a few months ago under the decision of Judges Lowell and Nelson that this act of 1882, being entitled "An act to carry out certain treaty provisions with China," did not apply to Chinese who were subjects of Great Britain, with whom we had made no supplemental treaty authorizing us to do any such thing. And therefore a Chinaman got into Boston from Hong Kong, and he is at large somewhere in the country now, and for all I know he is executing a flank movement upon California. * * *

It is to arrest the incursion of such Chinamen that this act is prepared and presented Let me read from the report of the majority to prove this:

To show that it—

This act—

To show that it has failed so to do—

To keep out the Chinese—

your committee have only to cite the decision of Judges Lowell and Nelson of the United States circuit court in Massachusetts, to the effect that the Chinese laborer born on the island of Hong Kong, after its cession to Great Britain, is not within the provisions of the act of 1882.

That is all they have to say. The words are "they have only to cite." So that this is the be-all and the end-all of this matter—to keep out English Chinamen from the United States.

Where are your treaty rights to do that? Did you vote for steel cruisers the other day when you were anticipating the presenting

and putting this bill through the House? How long, think you, England would keep her ironclads from bombarding our cities if you should refuse to her subjects, Chinamen though they are, the right to set foot upon our shores? * * *

* * * * *

I move to amend by striking out of lines 110, 111, and 112 the words "or of such other foreign government of which at the time such Chinese person shall be a subject."

I want to call the attention of the members of this committee to what we are doing at this moment. We are making history, or affording a chance for history to be made, with rather astounding rapidity. We have left the subject of Chinese laborers; they are excluded; every crack and cranny have been stopped.

We are now coming to the question of merchants, travelers, and other persons of the Chinese race, and in this section we are attempting to hinder and impede their coming and going of their own free will and accord, as is provided for in every treaty between this country and China.

More, the words which I moved to strike out also provide that merchants, subjects of other governments than China, but of the Chinese race, shall be hindered and restricted in their efforts to enter this country. Now, that is in direct conflict with our treaties with other nations than China—with Great Britain, with Brazil, with France, if France should obtain Chinese subjects.

Mr. Hitt, also a member of the Committee, said (idem, pp. 3761 and 3762):

But all that I have discussed is the smallest and least important part of this bill.

The essence of the bill, upon which the gentleman from Indiana (Mr. Lamb) in charge of the bill keeps his eye all the way through, is that brief provision in the fifteenth section:

"That the provisions of this act shall apply to all subjects of China, and Chinese whether subjects of China or any other foreign power."

There are many hundred thousands who are Chinese in blood, in language, in race, who are subjects and citizens of various other great powers than China.

We have treaties with them guaranteeing to Americans the right to go and sojourn in their countries, and to their subjects the right to come freely and pass through or reside here. In utter violation of these treaties the bill proposes to exclude Chinese persons who are subjects of any of these great powers, born under their flag, and owing them allegiance.

* * * * * * *

* * * Subjects of all these powers are to be dealt with by this bill. It declares boldly that it applies with its every restriction to them all in spite of treaties, guaranteeing free intercourse and of international law and the sacred faith of the nation.

It is no answer to say that the English themselves in Australia exclude Chinese laborers. This is a provision to harry English subjects and subjects of other governments who are not laborers at all, but travelers and merchants. It is so bald a violation of our treaty obligations with many nations that the case can not be made stronger by any argument than it is by the statement. We have in our treaties declared that all citizens and subjects of these governments should have with respect to the United States the

right of free entry and residence, and we have the "most favored nation" clause in almost every treaty. I have often met at Paris a gentleman of the Chinese race, a distinguished scholar, who is a professor in the most splendid university in Europe. He is a French citizen, has a French wife and family. If he, though a learned man, should think he could instruct himself by listening to the debates of this body, before he could reach Washington he would have to be subjected to all the indignities contemplated by the sixth section of this bill. How long do you think it would be before the French minister would be inquiring at our State Department to know whether French citizens were to be outraged in such a manner; whether all the obligations of treaty and of international law, which is wider and older than treaties, were to be disregarded?

* * *

This bill, the gentlemen from California say, is intended to make law of Judge Field's decision where he held that a British subject of Chinese race and born at Hong Kong, coming to San Francisco, was excluded from landing by the provisions of the act of May, 1882; while Judges Nelson and Lowell, of Massachusetts, held that such a person landing at Boston was not. Gentlemen have spoken of that decision as showing that the law of May, 1882, and the treaty with China cover English subjects; the law carrying out what was the true meaning of the treaty, which they propose now to put beyond doubt. Judge Field says nothing as to the meaning of the treaty. He so construes the law as to find that a British subject was aimed at; but when he comes to the meaning of the treaty he says, that was a question for those who

> voted for the law to decide—and it is for you to-day to pass upon. * * *
>
> It is for us to-day in voting upon this bill to decide whether we will undertake to override that treaty with China and disregard all our other treaties with nations having persons of the Chinese race among their subjects.

Congressman Budd thus explained the scope of the bill (Idem p. 3770):

> Mr. Budd. I desire to state that the object of placing these words in the amendatory act was to provide that this act which is amendatory should not go into operation for ninety days. We have secured under the original act the exclusion of all the Chinese affected by it. But by the bill which is now under consideration we propose to exclude not only the subjects of China but all Chinese, whether the subjects of that or any other power. We make other limitations and restrictions. We require other necessary descriptions in the certificate; and unless we allow ninety days any of these people coming here with a certificate under the old act would be turned back—an act of injustice we do not desire to inflict.

LEGISLATION EXTENDING ACT OF 1882

Section 1 of the Act of May 6, 1882 (c. 126, 22 Stat. 58; U. S. C., Title 8, Sec. 263), provided that:

> * * * until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended * * *.

The Act of May 5, 1892 (c. 60, 27 Stat. 25), provided in Section 1:

> That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act.

That operated to keep Section 6 in effect until May 5, 1902.

The Treaty of 1894 with China then intervened. It allowed certificates to be issued to Chinese nationals by the government of their residence. The better view is that this was permissive, not mandatory, and that the provision of Section 6, allowing Chinese nationals residing abroad to use certificates from the Chinese Government, remained in effect. A treaty is not construed to repeal a statute by implication if it may be avoided. (*United States* v. *Lee Yen Tai*, 185 U. S. 213.)

On April 29, 1902, a few days before Section 6 of the Act of 1882, as amended, would otherwise have ceased to operate, an Act was passed (c. 641, 32 Stat. 176), which in Section 1 provided:

> That all laws now in force prohibiting and regulating the coming of Chinese persons, and persons of Chinese descent, into the United States, * * * are hereby, re-enacted, extended, and continued so far as the same are not inconsistent with treaty obligations, until otherwise provided by law, and said laws shall also apply to the island territory under the jurisdiction of the United States * * *.

This evidently related to laws in the form of statutes, not those in the form of treaties. It could not have been intended to extend beyond the period provided therein the operation of the Chinese treaty

of 1894, which allowed certificates from the government of residence. It kept in force that provision of Section 6 relating to certificates to Chinese subjects from the Chinese Government. If that had been repealed by the convention of 1894, as Acting Attorney General Conrad held, some difficulty would exist in saying it was in force in 1902 and extended by the Act of 1902, and that is why we prefer the view of Mr. Wu that the treaty of 1894 permitted certificates for Chinese nationals from the government of their residence but also allowed them to use certificates from the Chinese Government. At any rate, it has always been understood that Section 6 of the Act of 1882, as amended in 1884, became operative when the treaty of 1894 expired. If it did not, we now have no provision on the statute books requiring any certificates.

For history of Chinese exclusion legislation see Moore, International Law Digest, Vol. IV, p. 187.

RULE 30 OF REGULATIONS GOVERNING ADMISSION OF CHINESE ISSUED BY THE DEPARTMENT OF COMMERCE AND LABOR ON FEBRUARY 26, 1907

30. The officers whose titles are given below have been authorized by their respective Governments to issue to Chinese subjects or citizens of such Governments the certificates prescribed by Section 6 of the act approved July 5, 1884.

Brazil: Chiefs of police, or corresponding officers in the municipalities and civil subdivisions.

Canada:

Vancouver—Collector of customs.

Victoria—Collector of customs.

Ottawa—Chief controller of Chinese, or chief clerk in the department of trade and commerce.